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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WESTERN WATERSHEDS PROJECT;
NATURAL RESOURCES DEFENSE
COUNCIL; CENTER FOR BIOLOGICAL
DIVERSITY; CALIFORNIA TROUT;
ENVIRONMENTAL PROTECTION
INFORMATION CENTER; KLAMATH
SISKIYOU WILDLANDS CENTER; LOS
PADRES FOREST WATCH; SIERRA
FOREST LEGACY; and SEQUOIA FOREST
KEEPER,,

Plaintiffs,

v.

U.S. FOREST SERVICE,

Defendant.

Case No. 3:08-cv-01460-PJH

**JOINT STATUS CONFERENCE
STATEMENT**

Date: August 28, 2008
Time: 2:30 p.m.
Dept: Courtroom 3, 17th Floor
Judge: Phyllis J. Hamilton

Date Comp. Filed: March 14, 2008

Trial Date: Not Assigned

1 On August 25, 2008, the parties discussed the case management of this matter pursuant to
2 this Court's instructions at the initial case management conference conducted on August 14,
3 2008.

4 **A. Settlement Conference**

5 The parties have agreed that this matter should be referred to a magistrate for an Early
6 Settlement Conference, pursuant to ADR Local Rule 3-4(c).

7 **B. Motion to Sever Claims and Transfer Venue**

8 The parties request that the Court continue the hearing on the Forest Service's Motion to
9 Sever Claims and Transfer Venue until after the parties complete proceedings with a settlement
10 magistrate. Should the Early Settlement Conference fail to result in a resolution, the parties will
11 request that the Court reset that motion for hearing.

12 **C. Filing of an Answer**

13 The parties agree that, within 21 days of this Court's Case Management Order, the Forest
14 Service will file an Answer to Paragraphs [*Plaintiffs:* 1-82; *Defendants:* 1-40], 247-254, and the
15 Prayer for Relief, which will clarify the factual and legal issues in dispute prior to any Settlement
16 Conference.

17 **D. Consenting to a Magistrate**

18 Plaintiffs have suggested that the parties either consent to having a magistrate hear this
19 entire case, or alternatively that they jointly request that the Court refer portions of this action to
20 a magistrate for a Report and Recommendation, in order to relieve any pressure on this Court's
21 docket and to facilitate a more speedy determination of the merits. The Forest Service stated that
22 it was not willing, at this point, to agree to these proposals but may reconsider them.

23 **E. Case Management**

24 **1. Plaintiffs' Proposed Streamlined Test Case Approach**

25 While this case very well may be resolved in the Early Settlement Conference, if it is not,
26 Plaintiffs hope to address the Court's stated concerns with the "test case" approach outlined in
27 the July 25, 2008 Joint Case Management Statement. As outlined in Plaintiffs' Opposition to the
28 Forest Service's Motion to Sever Claims and Transfer Venue (Doc. 57), Plaintiffs believe that

1 severing this action into nine related litigations and transferring them to nine different courts
2 would be not only contrary to law, but also would create repetitive and potentially inconsistent
3 litigation, imposing a duplicative drain on multiple courts and lawyers, and decreasing the
4 possibility for a global resolution of the issues. At the same time, Plaintiffs recognize the case
5 management challenges that gave rise to the Court's concerns expressed during the August 14,
6 2008 Case Management Conference.

7 As a result, Plaintiffs propose a different streamlined "test case" approach to be
8 implemented by a magistrate or the Court. The parties initially would litigate only three sets of
9 representative test cases, with each set relating to a *single* legal issue. This limitation would
10 permit the Court to reach the primary legal issues in this case while considering only limited
11 excerpts of record.

12 The sole dispute with respect to each of the 138 decisions in this case is whether it
13 complies with Section 339 of the 2005 appropriations rider. This law contains two sentences,
14 which set forth *three* requirements that the Forest Service must satisfy: each decision must (1)
15 continue current grazing management; (2) be supported by monitoring data that show the grazing
16 allotment is meeting or moving toward desired conditions; and (3) comply with Forest Service
17 policy on extraordinary circumstances.¹ One set of representative test cases would be presented
18 for each of the three requirements of the rider. The Court could consider the three sets of test
19 cases in a single summary judgment motion, or in three separate summary judgment motions,
20 based upon short excerpts from the administrative record addressing the requirement in question.
21 Because the decisions at issue, by definition, were excluded from review under the National
22 Environmental Policy Act ("NEPA"), the administrative records for the decisions are much
23 shorter than the records in typical NEPA cases.

24 _____
25 ¹ Section 339 states: "For fiscal years 2005 through 2007, a decision made by the Secretary of
26 Agriculture to authorize grazing on an allotment shall be categorically excluded from
27 documentation in an environmental assessment or an environmental impact statement under the
28 National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if: (1) the decision
continues current grazing management; (2) monitoring indicates that current grazing
management is meeting, or satisfactorily moving toward, objectives in the land and resource
management plan, as determined by the Secretary; and (3) the decision is consistent with agency
policy concerning extraordinary circumstances."

1 Plaintiffs assert that there are “clear patterns” to the Forest Service’s abuses of Section
 2 339 of the rider. Second Amended Complaint ¶ 5. As a result, once the Court determines the
 3 meaning of the requirements—for example, what the phrase “continues current grazing
 4 management” requires—it will become far more clear which of the challenged decisions violate
 5 the rider. Such clarity should position the parties for settlement, or allow the Court quickly to
 6 dispose of the remaining decisions.

7 This streamlined approach would require the Court to focus on only limited and discrete
 8 portions of the administrative record for each test case decision. For example, the test cases
 9 relating to the Forest Service’s compliance with the first requirement of the rider, *i.e.*, whether
 10 the decision “continues current grazing management of the allotment,” would focus upon the
 11 level of grazing that has taken place on the allotment during the five years prior to the challenged
 12 decision. Plaintiffs intend to include as a test case the Forest Service’s July 12, 2006 decision to
 13 permit grazing on the Diamond Mountain allotment in the Lassen National Forest. *See*
 14 Attachment A. Based on what the Forest Service has produced in response to Plaintiffs’
 15 expansive FOIA requests, the relevant evidence of record concerning the first requirement is a
 16 single, three-page spreadsheet prepared by the Forest Service showing that the allotment was
 17 grazed in 2002 and 2003, but not at all in 2004, 2005 and 2006, and, arguably, the Annual
 18 Operating Instructions from 2002 and 2003,² each of which is only four pages long. *See*
 19 Attachments B-D. In short, determining whether the Diamond Mountain decision complies with
 20 the rider should require the review of only 11 pages from the administrative record.

21 Once the Court makes a decision on the Diamond Mountain decision, and the 1-2 other
 22 test cases Plaintiffs anticipate bringing related to the first requirement, it should become very
 23 obvious whether the 60 or so other decisions that Plaintiffs also challenge under the first prong of
 24 the rider should stand. While the interpretation of the other two requirements may require
 25 slightly more record evidence, none of the plaintiffs’ test case challenges will require the Court
 26 to analyze lengthy record excerpts, as the Court feared. Moreover, Plaintiffs are willing to work
 27

28 ² The Forest Service apparently did not issue Annual Operating Instructions in 2004-2006, when
 the allotment was not grazed.

1 with the Forest Service to identify joint excerpts of record to further minimize the breadth of the
2 record.

3 Contrary to the Forest Service's suggestion below, this Court (or a magistrate judge)
4 should not limit the "test cases" to decisions arising from National Forests within the Northern
5 District of California. As Plaintiffs explained in their Opposition to the Forest Service's motion
6 to sever and transfer, district courts can, and regularly do, decide environmental cases that affect
7 public lands in multiple states, particularly when agency decisions across different states or
8 regions bear the same or similar legal flaws, as alleged here.³ Besides, assuming that the Forest
9 Service's motion to sever and transfer must be denied (as Plaintiffs believe it must), then all 138
10 challenges are properly before this Court, and there is no reason to place any limit on the
11 geographic location of the "test cases."

12 Plaintiffs believe that, short of a settlement, their streamlined approach provides the most
13 straightforward way to balance the Court's need to consider a limited record with the desire of
14 the parties to obtain an expeditious and straightforward resolution of all 138 decisions, without
15 litigating each of them individually.

16 **2. Forest Service's Proposed Case Management Approach**

17 The Forest Service agrees that this litigation poses some daunting case management
18 challenges. In fact, this is not a single case, but a conglomeration of a number of individual
19 cases, brought by different groups of plaintiffs and concerning grazing allotments within
20 different judicial districts. For that reason, the Forest Service filed its motion to sever and
21 transfer. As an alternative to plaintiffs' revised "test case" approach (discussed above), the Court

22 ³ See e.g., *Forest Guardians v. Johanns*, 450 F.3d 455, 458 (9th Cir. 2006) (describing case
23 brought in District of Arizona that challenged federal grazing permits from Arizona and New
24 Mexico); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1064-65 &
25 n.3 (9th Cir. 2004) (describing challenge in Western District of Washington to multiple biological
26 opinions covering national forests in Washington, Oregon, and California, using six decisions as
27 test cases); *Forest Guardians v. Dombeck*, 131 F.3d 1309, 1310-11 (9th Cir. 1997) (describing
28 litigation and preliminary injunction in District of Arizona over activities on eleven national
forests in Arizona and New Mexico); *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096
(W.D. Wash. 1991) (enjoining timber sales in Washington, Oregon, and California for violating
National Forest Management Act); *National Wildlife Fed'n v. Burford*, 677 F. Supp. 1445 (D.
Mont. 1985) (case challenging sale of coal leases on public lands in Montana and Wyoming);
Mountain States Legal Fed'n v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980) (controversy over oil

1 could resolve the two grazing allotment decisions that concern Forests within this judicial
 2 district, which might provide the Parties guidance as to future litigation, just as plaintiffs' test
 3 case approach, but without requiring the Court to make determinations as to Forests far removed
 4 from this jurisdiction.

5 However, the Forest Service is willing to work with the plaintiffs to determine whether
 6 there is a common approach that may be taken with respect to at least some of these grazing
 7 allotments that might help to narrow or resolves the issues. To that end, the Forest Service is
 8 willing to defer its motion to sever and transfer. The Forest Service also would not object to a
 9 reference to a Magistrate Judge for purposes of further case management discussions or some
 10 manner of alternative dispute resolution. With the Magistrate Judge's guidance, and after taking
 11 a closer look at individual allotment decisions, the Parties may be able to better assess how best
 12 to proceed. If it does not appear that it is possible to take a more global approach than
 13 proceeding allotment-by-allotment, then the motion to sever and transfer should be placed back
 14 on the Court's calendar for resolution.

15 Dated: August 27, 2008

FOR PLAINTIFFS

16
17
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28 and gas lease applications on national forests in Wyoming, Idaho, and Montana).

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ATTORNEY ATTESTATION OF CONCURRENCE

I hereby attest that I have obtained concurrences in this filing for the signatures indicated
by a "conformed" signature ("s/") within this e-filed document.

Dated: August 27, 2008

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